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Frederick C. Sake

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and held that "whether the sale or exchange of shares of stock gives rise to ordinary as opposed to capital gain or loss depends upon whether the taxpayer purchased and held the stock with a *predominant business motive as distinguished from a predominant investment motive.*"⁴²

Thus the IRS argued in *Windle* that the presence of *any* investment motive will destroy ordinary asset treatment while in the Revenue Ruling the IRS contended that it is the *predominant* motive which controls. The reaction of taxpayers is readily predictable. Taxpayers seeking ordinary losses will go to the Court of Claims and argue that their predominant motive was a business purpose under the Revenue Ruling; taxpayers seeking capital gains will go to the Tax Court and argue *Windle*, claiming that they had *some* investment motive in the transaction.

Another ironic twist is that the IRS argued a position in *Windle* which would make capital gains treatment seemingly easy to obtain. It is difficult to conceive of a gain situation resulting from a stock transaction where the taxpayer would be unable to establish *any* investment motive.

The *Windle* decision has placed the IRS in an uncomfortable corner. It is suggested that the IRS implore the taxpayer in *Windle* to appeal the case so that the IRS can concede it.

RONALD B. RAVIKOFF

Accused's Silence During Custodial Interrogation May Not Be Used to Impeach Credibility

Pursuant to Miranda, a defendant has a right to remain silent during custodial interrogation. As a concomitant of that right, a recent United States Supreme Court decision held that a defendant's failure to offer exculpatory statements during such an investigation may not be used in the subsequent trial for the purpose of impeachment as a prior inconsistent statement. The author criticizes the majority's failure to base its decision on constitutional, rather than evidentiary grounds, as this leaves the door open for future use of "silence" for other purposes at trial.

42. *Id.* at 68 (emphasis added).

Defendant Hale was arrested for robbery in the District of Columbia, taken to the police station, and advised of his right to remain silent. He was searched and found to be in possession of \$158 in cash. Hale made no response when asked: "Where did you get the money?" At trial, in federal district court, Hale took the stand, asserted his innocence, and presented his alibi. The prosecutor, in attempting to impeach Hale's explanation of his possession of the money, caused Hale to admit on cross-examination that he had not offered the exculpatory information at the time of police interrogation. The trial court instructed the jury to disregard the colloquy but refused to declare a mistrial. Hale was convicted. On appeal, the court of appeals reversed,¹ holding that inquiry into Hale's prior silence impermissibly prejudiced his constitutional right to remain silent² under *Miranda v. Arizona*.³ On certiorari,⁴ the United States Supreme Court *held*, affirmed: It is prejudicial error for a federal court⁵ to permit cross-examination of a defendant concerning his silence during police interrogation. *United States v. Hale*, 422 U.S. 171 (1975).

Though split, a majority of the courts which have dealt with the same or similar issue have held that a defendant's silence prior to trial cannot be brought out at trial.⁶ Two circuits, however, have

1. *United States v. Hale*, 498 F.2d 1038 (D.C.Cir. 1974) (companion case to *United States v. Anderson*). The Court of Appeals for the D.C. Circuit, applying *Grunewald v. United States*, 353 U.S. 391 (1957), found as a matter of law that there was no inconsistency between defendant's silence during police interrogation and his testimony at trial. The court then stated that even if the silence had been inconsistent, Hale had actually exercised his right to remain silent and that therefore his silence did not fall within *Harris v. New York*, 401 U.S. 222 (1971) and was directly protected by *Miranda v. Arizona*, 384 U.S. 436 (1966) and the fifth amendment privilege not to be compelled in any criminal case to be a witness against himself. 498 F.2d 1038, 1042-43 (D.C. Cir. 1974).

2. U.S. CONST. amend. V: "No person . . . shall be compelled in any criminal case to be a witness against himself" See *Johnson v. New Jersey*, 384 U.S. 719 (1966); *Ullmann v. United States*, 350 U.S. 422 (1956).

3. 384 U.S. 436 (1966).

4. Certiorari was granted, *United States v. Hale*, 419 U.S. 1045 (1974), because of conflict among the courts of appeals over whether a defendant can be cross-examined about his silence during police interrogation, and because of the importance of the question to the administration of justice.

5. The *Hale* majority, not reaching the constitutional question, decided the case upon evidentiary grounds. The holding, not being constitutionally mandated, is therefore not mandatory on the various states, and is merely persuasive outside the federal courts. See *Herb v. Pitcairn*, 324 U.S. 117 (1945); *Murdock v. City of Memphis*, 87 U.S. (20 Wall.) 590 (1875).

6. See, e.g., *Johnson v. Patterson*, 475 F.2d 1066 (10th Cir. 1972), *cert. denied*, 414 U.S. 878 (1973); *United States v. Semensohn*, 421 F.2d 1206 (2d Cir. 1970); *United States v.*

permitted the introduction of defendant's prior silence.⁷

A number of the courts that proscribed bringing out defendant's silence have based their holdings directly on the *Miranda* dicta where the Court stated:

In accord with our decision today, it is impermissible to penalize an individual for exercising his Fifth Amendment privilege when he is under police custodial interrogation. *The prosecution may not, therefore, use at trial the fact that he stood mute or claimed his privilege in the face of accusation.*⁸

While the United States Supreme Court had not previously passed directly upon this issue, it had held in *Harris v. New York*⁹ that the prosecution's use of an accused's pre-*Miranda*-warning statements for the limited purpose of impeachment is permissible. The Court based that holding on its view that, although the defendant must be protected against the state's attack on the basis of his unconstitutionally elicited statements, the defendant does not have a right to commit perjury and have his later inconsistent or fabricated statements go to the jury without impeachment.¹⁰ Thus *Miranda* was viewed by *Harris* as a shield but not as a sword. As mere silence provides no basis for an inference as to either the truth or falsity of defendant's later testimony at trial, silence must clearly come within the *Miranda*-shield reasoning rather than the *Harris*-anti-sword exception.

Hale is probably more significant for what it does not say than for what it does. Taken on its face, *Hale* would seem merely to resolve a simple question of the law of evidence: Whether the silence of an accused, who has been given his *Miranda* warnings, can be a prior inconsistent statement so as to be used to impeach his credibility when and if he chooses to testify in his own behalf. Indeed, the Court, speaking through Mr. Justice Marshall, opens the main thrust of its reasoning by reviewing the law of evidence as to prior inconsistent statements¹¹ and repostulates that silence gains probative value "only if it would have been natural under the circumstan-

Brinson, 411 F.2d 1057 (6th Cir. 1969); *Fowle v. United States*, 410 F.2d 48 (9th Cir. 1969).

7. *Burt v. New Jersey*, 475 F.2d 234 (3d Cir. 1973); *United States v. Ramirez*, 441 F.2d 950 (5th Cir.), *cert. denied*, 404 U.S. 869 (1971).

8. 384 U.S. at 468 n.37 (emphasis added).

9. 401 U.S. 222 (1971).

10. *Id.* at 225-26.

11. See 3A J. WIGMORE, EVIDENCE § 1040 (Chadbourn rev. 1970).

ces to object to the assertion in question."¹²

In analyzing the probative value of an accused's silence, the Court recognized the inherent distinction between the silence of one in custodial interrogation as opposed to one who, in other circumstances, happens to be the hearer of an assertion which would normally call for a reply. The former is under no duty to speak and has ordinarily been advised only moments earlier that he has the right to remain silent and that anything he does say can and will be used against him in court.

Under these circumstances, his failure to offer an explanation during the custodial interrogation can as easily be taken to indicate reliance on the right to remain silent as to support an inference that the explanatory testimony was a later fabrication. There is simply nothing to indicate which interpretation is more probably correct.¹³

On the other hand, if the prosecution is allowed to elicit the fact of defendant's prior silence and to use this against him as if substantive evidence of guilt, that silence will no doubt prejudice a defendant in the eyes of the jury, impermissibly shifting the burden of proof from the state to the defendant. Thus, the possible prejudice far outweighs any imagined probative value.

The Court sought to support its position as "compelled"¹⁴ by the decision in *Grunewald v. United States*.¹⁵ There, the Court laid out three factors to determine whether prior silence was inconsistent with later exculpatory testimony. Those factors are: (1) repeated assertions of innocence; (2) the secretive nature of the initial questioning; and (3) the focus on the accused as a potential defendant at the time of arrest, making it "natural for him to fear that he was being asked questions for the very purpose of providing evidence

12. 422 U.S. at 174. One is led to wonder if the assertion alluded to is any assertion at all. The question which Hale refused to answer was: "Where did you get the money?" Surely this question cannot raise an adoption of fact in the hearer. See 3A J. WIGMORE, *supra* note 11, at § 1042.

13. 422 U.S. at 177.

14. *Id.* at 175-76.

15. 353 U.S. 391 (1957). In *Grunewald*, again acting under the Court's supervisory power rather than under any constitutional requirement, the Court stated that silence in the face of grand jury accusation is not inconsistent with later testimony at trial. The defendant had refused to answer grand jury questions on fifth amendment grounds and at trial the prosecutor, for purposes of impeachment, elicited testimony concerning defendant's silence.

against himself.”¹⁶ The *Hale* majority reasoned that these factors, as applied to Hale’s silence, weighed even more heavily for exclusion. The defendant had repeatedly and consistently asserted his innocence; the forum in which defendant was questioned was secretive, intimidating, and lacked even minimal safeguards;¹⁷ and defendant had already been placed under arrest.

The government relied heavily on *Raffel v. United States*,¹⁸ where the Court held that the defendant’s silence at his first trial was inconsistent with his testimony at the second, and that the former silence could be used to impeach the credibility of his later representations. The government argued that since Hale chose to testify in his own behalf at trial, it would be permissible under *Raffel* to impeach his credibility by proving that he had chosen to remain silent at the time of arrest.¹⁹ The *Hale* Court rejected this contention and distinguished *Raffel* on the basis that “[t]he assumption of inconsistency underlying *Raffel* is absent here.”²⁰

Unfortunately, the *Hale* majority followed the evidentiary problem of *Grunewald* and Justice Harlan’s “more likely to remain silent in secret proceedings” argument²¹ while side-stepping *Raffel* and the constitutional question presented.²² Thus the Court left open the question “whether the *Raffel* decision has survived”²³ and whether defendant’s silence may still be used against him under certain circumstances.²⁴ This was the very problem which caused

16. *Id.* at 422-23.

17. The *Grunewald* grand jury investigation was conducted in the presence of public arbiters and a reporter, whereas Hale was questioned in secretive surroundings with no one but the police present. 422 U.S. at 179.

18. 271 U.S. 494 (1926).

19. 422 U.S. at 175.

20. *Id.*

21. “Innocent men are more likely to [remain silent] in secret proceedings where they testify without advice of counsel and without opportunity for cross-examination, than in open court proceedings where cross-examination and judicially supervised procedures provide safeguards for the establishing of the whole, as against the possibility of merely partial truth.” 422 U.S. at 178 n.6, citing *Grunewald v. United States*, 353 U.S. 291, 422-23 (1957).

22. The Court recognized the “constitutional overtones” presented by this line of cases, 422 U.S. at 180 n.7, but failed to reach the constitutional claim raised. *Id.* at 175 n.4.

23. *Id.* It should be noted that *Hale* does not explicitly overrule *Raffel*, which arguably maintains its viability on its own facts.

24. See Chief Justice Burger’s concurring opinion to the effect that the Court rightly avoided placing the decision on constitutional grounds, but criticizing the rebirth of the

the conflict in the courts of appeals on which certiorari was granted.²⁵

Justice Douglas and Justice White, however, squarely based their concurring opinions on constitutional grounds, finding the case to be controlled by *Miranda*. Justice Douglas reiterated Justice Black's concurring opinion in *Grunewald*: "I can think of no special circumstances that would justify use of a constitutional privilege to discredit or convict a person who asserts it."²⁶

Justice White, after a reminder that he is no more enthusiastic about *Miranda* now than when that decision was first announced,²⁷ noted however, that once accepting its existence, he, unlike the majority, believes that due process prevents the prosecutor from calling attention to the defendant's prior silence. "Surely Hale was not informed here that his silence, as well as his words, could be used against him at trial. Indeed, anyone would reasonably conclude from *Miranda* warnings that this would not be the case."²⁸

Unless the Court is contemplating a significant withdrawal from *Miranda*,²⁹ allowing the prosecutor to comment, even in "special circumstances,"³⁰ on the defendant's silence has a direct and impermissible impact on constitutional rights by affixing a penalty to the assertion of the defendant's right to remain silent. In *Griffin v. California*,³¹ the Court refused to allow comment on an accused's failure to testify, on the basis that the decision of whether to speak must be unfettered, and that therefore there can be no penalty

"generalized probability" of "likelihood of remaining silent." 422 U.S. at 181. See note 21 *supra*.

25. See footnotes 6-7 *supra* and accompanying text.

26. 422 U.S. at 182, citing *Grunewald v. United States* 353 U.S. 391, 425 (1957) (Black, J., concurring).

27. 422 U.S. at 182.

28. *Id.* at 183.

29. For cases limiting to some extent the scope of *Miranda*, see *Michigan v. Mosely*, 96 S. Ct. 321 (1975); *Oregon v. Hass*, 420 U.S. 714 (1975); *Michigan v. Tucker*, 417 U.S. 433 (1974); *Harris v. New York*, 401 U.S. 222 (1971). A further withdrawal from *Miranda* may be indicated in light of the retirement of Mr. Justice Douglas on November 12, 1975.

30. 422 U.S. at 177. The Court indicates that in other than "emotional and confusing circumstances" use of defendant's silence may still be permissible. It is stressed that here, Hale "could not have expected the police to release him merely on the strength of his explanation." *Id.* at 179-80. The Court may be establishing a defendant's expectation of the necessity to waive his rights as the test of special circumstances. This would be dangerously close to eroding the *ratio decidendi* of *Miranda*.

31. 380 U.S. 609 (1965).

imposed which would make the assertion of that privilege costly.³² Permitting the use of an arrestee's silence under any circumstances would lead to the anomaly of advising the arrestee that he has the right to remain silent and, whether or not he gives up that right, anything he says or fails to say can be used against him.³³ It is this very type of coercion, brought to bear by interrogating officials, that the *Miranda* Court sought to prevent. "[T]o permit [even in special circumstances] one's shielding of himself with his fifth amendment right to be converted into a weapon against him drains the right of much of its significance."³⁴ To allow such a cross-examination would compel the defendant to sacrifice either his right to remain silent prior to trial or his right to testify in his own defense.³⁵

The holding in *Hale* may unfortunately be taken by some in the federal courts as a signal to look for any special circumstances³⁶ falling beyond the *Grunewald* factors. More dangerously, because the decision is based only on evidentiary grounds, it may be taken by those in the state court systems as an invitation to allow all such cross-examination as being beyond the Court's supervisory powers.³⁷ Absent the Court's directly addressing the constitutional questions, the federal circuits remain split and the states remain free to interpret the issue as they see fit.

FREDERICK C. SAKÉ

32. *Id.* at 614.

33. As early as *McCarthy v. United States*, 25 F.2d 298 (6th Cir. 1928), the Sixth Circuit realized that if a defendant's prior silence is allowed to be used against him "the customary formula of warning should be changed, and the respondent should be told, 'If you say anything, it will be used against you; if you do not say anything, that will be used against you.'"

Id. at 299.

34. *Fowle v. United States*, 410 F.2d 48, 53 (9th Cir. 1969).

35. *Id.* at 53-54.

36. See note 30 *supra*.

37. See note 5 *supra*.